

REASONS FOR GRANTING THE WRIT

I.

There is conflict among the circuits over whether the test for ineffective assistance of counsel in the plea process announced by this Court in *Hill v. Lockhart* materially differs from the test promulgated in *Strickland*. Ineffective assistance of counsel in the plea process is a recurring claim and the correct standard for its determination is an important issue for resolution by this Court.

Additionally, the district judge in this case noted the dearth of authority addressing defense counsel's duties and obligations in conveying a plea offer to a defendant. The petitioner's counsel acknowledged that he did not inform the client of his sentencing exposure under the Federal Sentencing Guidelines or sentencing statutes, or the advisability or consequences of accepting the government's plea offer versus proceeding with trial. The courts, prosecutors, and defense counsel need to know the requirements that counsel must meet to afford a defendant effective assistance in the plea process.

II.

This case presents a question arising under the Sixth Amendment which has resulted in conflicting answers among the circuits, namely, what is a defendant's burden to establish the prejudice prong of *Strickland* where he claims that his rejection of a plea offer was attributable to the ineffectiveness of his counsel? Certiorari review is sought because the issue is important and recurring.

ARGUMENT

I.

CERTIORARI REVIEW IS REQUESTED TO: (A) RESOLVE THE CIRCUIT CONFLICT CONCERNING THE STANDARDS FOR DETERMINING A SIXTH AMENDMENT INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN THE PLEA PROCESS; (B) DETERMINE WHAT INFORMATION COUNSEL MUST BE CONVEY TO A DEFENDANT IN ORDER TO SATISFY THE PERFORMANCE PRONG OF THE *STRICKLAND* STANDARD IN THE PLEA PROCESS, INCLUDING WHETHER COUNSEL HAS A DUTY TO KNOW AND DISCUSS THE CLIENT'S SENTENCING EXPOSURE UNDER THE APPLICABLE SENTENCING STATUTES OR GUIDELINES.

A.

In order to establish ineffective assistance of counsel in violation of the Sixth Amendment, the defendant must ordinarily satisfy the two elements of *Strickland*. The defendant must first show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88, 104 S.Ct. at 2064. Second, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In *Hill v. Lockhart*, this Court held that in evaluating a claim of ineffective assistance of counsel in the plea process, "the first half of the *Strickland* test is nothing more than a restatement of the standard of attorney competence...." *Id.* at 59, 106 S.Ct. at 370. However, in order to satisfy the "prejudice" requirement, the defendant need only show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on-going to trial." *Id.* at 59, 106 S.Ct. at 370. See also *Roe v. Flores-Ortega*, 528 U.S. 470, 485, 120 S.Ct. 1029, 1039, 145 L.Ed.2d 985 (2000) (reiterating *Hill v. Lockhart* prejudice test and applying similar test for prejudice

to ineffectiveness of counsel claim for failure to file notice of appeal).

Two circuits hold that the difference between *Strickland* and *Hill* concerning the prejudice requirement is meaningful. In *United States v. Griffin*, 330 F.3d 733, 737 (6th Cir.2003), the Sixth Circuit concluded that it is " ... easier to show prejudice in the guilty plea context because the claimant need only show a reasonable probability that he would have pleaded differently." In *Ostrander v. Green*, 46 F.3d 347, 352 (4th Cir.1995) (overruled on other grounds by *O'Dell v. Netherland*, 95 F.3d 1214, 1222 (4th Cir.1996)), the Fourth Circuit explained that a decision of a district judge that applies the *Strickland* test for prejudice in the plea context instead of the test announced in *Hill* must be reversed:

[T]he district court applied the wrong legal standard to Ostrander's ineffective assistance claim. It used the *Strickland v. Washington* test instead of the more specific *Hill v. Lockhart* standard for guilty pleas induced by ineffective assistance. There is a significant difference between the tests. Under *Strickland*, the defendant shows prejudice if, but for counsel's poor performance, there is a reasonable probability that the outcome of the entire proceeding would have been different. Under *Hill*, the defendant must show merely that there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial.

Ostrander, 46 F.3d at 352 (emphasis supplied).

By contrast, in the case at bar, the district judge applied the legal standard for prejudice deemed incorrect by the Fourth and Sixth Circuits in *Ostrander* and *Griffin*. On appeal by the petitioner, the Eleventh Circuit affirmed without noting the district court's claimed error and without drawing any distinction between *Strickland* and *Hill*. The conflict with *Hill* and the need for identification of the correct standard present important issues warranting certiorari review.

B.

In addressing the question whether O'Donnell's performance in communicating the plea offer to the petitioner

violated the petitioner's Sixth Amendment right to effective assistance of counsel, the district judge noted that in the plea process,

[t]he case law does not clearly define how much and what kind of information must be conveyed to a defendant in order to satisfy the performance prong of the *Strickland* standard.

Id.

Certiorari review would afford this Court the opportunity to provide guidance to the courts, prosecutors, and defense counsel on this critical facet of the criminal justice system. Sentencing statutes and guidelines are increasingly complex. The need for a minimal level of competent representation in the plea process cannot be disputed.

The Court is respectfully requested to grant review so that the duties and obligations of defense counsel in the plea process concerning sentencing can be explored and determined.

II.

CERTIORARI IS SOUGHT TO RESOLVE THE CIRCUIT CONFLICT OVER WHETHER A PETITIONER SATISFIES THE PREJUDICE COMPONENT OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PLEA PROCESS WHERE HIS TESTIMONY THAT HE WOULD HAVE ACCEPTED THE PLEA OFFER BUT FOR COUNSEL'S INEFFECTIVENESS IS SUPPORTED BY "OBJECTIVE EVIDENCE" SUCH AS A SUBSTANTIAL DISPARITY BETWEEN THE SENTENCE IMPOSED AFTER CONVICTION AND THE SENTENCE PROPOSED IN THE PLEA OFFER AND/OR BY CORROBORATING TESTIMONY OF TRIAL COUNSEL.

The district judge in this case concluded that even if the petitioner's trial counsel was ineffective for failing to have advised the petitioner in the plea process about sentencing exposure, Sentencing Guidelines, and the consequences of accepting the plea offer versus proceeding to trial, the petitioner was not prejudiced. The judge reasoned that the petitioner could not show prejudice, as required for relief under the second prong of *Strickland*, "simply by asserting in hindsight that he would have accepted a plea agreement" had he been properly represented and informed. (R25-31-32). Citing *Paters v. United States*, 159 F.3d 1043 (7th Cir.1998) and *United States v. Gordon*, 156 F.3d 376, 381 (2d Cir.1998), the district judge ruled that the petitioner was required to offer "objective evidence" in support of a showing of prejudice. Finding no such evidence, the district judge concluded that the petitioner's self-serving testimony that he would have accepted the plea was not credible.

On appeal to the Eleventh Circuit, the petitioner argued that his testimony was indeed supported by "objective evidence" in at least two respects: first, the substantial disparity between the sentence under the plea offer (no incarceration, no felony conviction) and the petitioner's exposure to a maximum term of incarceration for 10 years upon conviction after trial as well as the 60-month sentence and felony convictions ultimately imposed; and second, the corroborating testimony of the petitioner's trial counsel.

In support of his argument, the petitioner relied upon

decisions of several courts of appeals holding that "objective evidence" is established, thereby satisfying the prejudice requirement of *Hill v. Lockhart*, where the record shows a substantial disparity between a defendant's actual maximum sentencing exposure under the Sentencing Guidelines and the sentencing exposure incorrectly represented by defense counsel. Under this rule, the disparity is deemed sufficiently "objective" to establish a reasonable probability that the defendant would have accepted the plea offer. See e.g., *Riggs v. Fairman*, 399 F.3d 1179, 1183-84 (9th Cir.2005); *Mask v. McGinnis*, 233 F.3d 132, 142 (2d Cir.2000); *Gordon*, 156 F.3d at 381; *United States v. Day*, 969 F.2d 39 (3d Cir.1992). Here, the petitioner faced a maximum prison term of 10 years upon conviction and his actual sentence upon conviction was five years. The plea offer, by contrast, was tantamount to a traffic ticket -- a misdemeanor plea, no incarceration, no requirement to testify.

Various courts of appeals hold that objective evidence can also be established by the testimony of a defendant's trial counsel that corroborates the critical aspects of his client's testimony. In *Boria v. Keane*, 99 F.3d 492 (2d Cir.1996), the defendant substantiated his allegation of prejudicial ineffective assistance with the testimony of his counsel who "made clear" that he never discussed with his client the advisability of accepting or rejecting the plea offer. *Boria*, 99 F.3d at 495. *Boria*'s trial counsel testified that he "never gave his client any advice or suggestion" as to how to deal with the plea bargain. *Id.* at 497-98. Similarly in *United States v. Day*, 969 F.2d 39 (3d Cir.1992), the Third Circuit remanded for an evidentiary hearing noting that defense counsel's corroborative testimony "might qualify as sufficient confirming evidence."

In this case, the testimony of O'Donnell strongly corroborated his client's testimony. O'Donnell acknowledged that he failed to advise the petitioner whether to accept the plea offer and failed to inform the petitioner of sentencing exposures. But in the Eleventh Circuit, such testimony does not constitute "objective evidence." In other circuits, a criminal defense attorney's testimony acknowledging such failures is accorded great weight and deemed to be substantial objective evidence. See *Boria*, *supra*; *Day*, *supra*.

Contrary to the impression the decision of the Eleventh Circuit might initially convey, this is not a case that called

for summary affirmance on the ground that the district judge made an unreviewable credibility determination. Rather, this case involves important constitutional questions about the correct legal standards to be applied and the proof required to establish prejudice under *Hill v. Lockhart*. Other circuits have addressed these questions at length. Indeed, had the petitioner's case arisen in one of the other circuits cited above, his testimony, along with that of his trial counsel, and consideration of the sentencing disparities, would have been deemed sufficient to establish prejudice. Certiorari review is respectfully requested for consideration and clarification of these important questions.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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DATED: September 2005



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Supreme Court, U.S.
FILED

No. 05-425 SEP 19 2005

IN THE OFFICE OF THE CLERK
Supreme Court of the United States

JOHN GOUDIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

APPENDIX IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

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dated July 21, 2004

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED

No. 04-13328
Non-Argument Calendar

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 28 2005

THOMAS K. KAHN
CLERK

D.C. Docket Nos. 03-21071-CV-JAL
97-00582-CR-JAL

JOHN GOUDIE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(February 28, 2005)

Before DUBINA, HULL and WILSON, Circuit Judges.
PER CURIAM:

Appellant John N. Goudie, a federal prisoner proceeding through counsel, appeals the district court's denial of his 28 U.S.C. §2255 motion to vacate, set aside, or correct his sentence. On appeal, Goudie argues that he was denied effective assistance of counsel in the plea process, asserting that (1) counsel's failure to discuss with him the possible sentences under the federal sentencing guidelines and the consequences of rejecting the plea offer was unreasonable; and (2) counsel's failure prejudiced him. With regard to counsel's competency, Goudie does not challenge the factual findings by the district court, but argues that those facts do not support the district

court's conclusion that he was afforded effective assistance. Citing cases from other circuits, he argues that his rejection of the plea offer was uninformed because he was not advised on the consequences of rejecting the plea offer and received no advice on the plea offer. With regard to prejudice, Goudie argues that his testimony, corroborated by (1) the substantial disparity between the plea offer sentence and the possible sentence upon conviction and (2) counsel's testimony, showed that there was a reasonable probability that he would have accepted the plea offer.

An ineffective assistance of counsel claim is a mixed question of law and fact that is subject to *de novo* review. *Hagins v. United States*, 267 F.3d 1202, 1204 (11th Cir. 2001). To prevail, the defendant must demonstrate both that (1) his counsel's performance was deficient, *i.e.*, the performance fell below an objective standard of reasonableness, and (2) he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984). To meet the deficient performance prong of the *Strickland* test, the defendant must show "that counsel made errors so serious that [he or she] was not functioning as the counsel guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064 (internal quotation marks omitted). There is a strong "presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. at 2065. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985), the Supreme Court applied the *Strickland* test to ineffective assistance of counsel claims involving guilty pleas. The Court noted that, in the context of guilty pleas, the performance prong of the *Strickland* test remains whether counsel's representation was "within the range of competence demanded of attorneys in criminal cases." *Id.* at 56-57, 106 S.Ct. at 369. With regard to the prejudice prong, the Court held that the inquiry focused on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 58-59, 106 S.Ct. at 370. We have applied *Hill* to

ineffective-assistance-of-counsel claims by defendants who reject a guilty plea. *Coulter v. Herring*, 60 F.3d 1499, 1503-04 n. 7 (11th Cir. 1995) (citations omitted).

We have stated that, "[w]hen a defendant pleads guilty on the advice of counsel, the attorney has the duty to advise the defendant of the available options and possible consequences." *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. Unit B March 1981) (citation omitted)¹. "It is equally essential that the attorney advise a defendant of possible consequences where...the defendant withdraws a negotiated guilty plea and stipulated sentence in the minimum range and instead stands trial and faces the maximum sentence." *Id.* We have also stated that, to enable the defendant to make an informed and conscious choice between accepting the prosecution's offer and going to trial, counsel must "offer his informed opinion as to the best course to be followed in protecting the interests of his client." *Wofford v. Wainwright*, 748 F.2d 1505, 1508 (11th Cir. 1984) (citation omitted) (discussing the interests of a defendant who pleads guilty in considering whether the district court violated due process by adopting the magistrate's credibility findings without hearing live testimony bearing on the defendant's ineffective-assistance-of-counsel-claim). Such interests include "having, before he judges the desirability of the plea bargain, a general knowledge of the possible legal consequences of facing trial." *Id.* However, [t]he right to competent plea bargain advice is at best a privilege that confers no certain benefit....An accused may make a wise decision even without counsel's assistance, or a bad one despite superior advice from his lawyer." *Id.*

Where a defendant challenges a not-guilty plea based on ineffective assistance of counsel, he "must show that there is a reasonable probability that, but for counsel's errors, he would...have pleaded guilty and would [not] have insisted on going to trial." *Coulter*, 60 F.3d at 1504 (internal quotation and citation omitted)

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In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

(alteration in original); see also *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991) (finding no prejudice where a defendant did not allege that but for counsel's errors, he would have accepted the plea offer). In *Diaz*, we held that the defendant failed to establish prejudice where the defendant (1) had not "allege[d] that but for his attorney's errors, he would have accepted the plea offer" and (2) had cited "no evidence to indicate that prior to his conviction he expressed any desire to plead guilty." 930 F.2d at 835. We concluded that, "given [the defendant's] awareness of the plea offer, his after the fact testimony concerning his desire to plead, without more, [was] insufficient to establish that but for counsel's alleged advice or inaction, he would have accepted the plea offer." *Id.* (citing *Johnson v. Duckworth*, 793 F.2d 898, 902 n.3 (7th Cir. 1986) (noting that it was "seriously doubtful" whether a defendant's after the fact testimony regarding his desire to plead guilty alone would be sufficient to establish prejudice)). We further noted that the defendant "ha[d] not established facts that, if proven, would entitle him to relief." *Id.*

Even if counsel was constitutionally required to advise Goudie on whether or not to accept the plea offer and/or explain his sentencing exposure under the guidelines, we conclude from the record that Goudie has failed to show prejudice. See *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) (a reviewing court need not address the performance prong of the test if the defendant cannot meet the prejudice prong, or vice versa). In the instant case, the district court explicitly found that Goudie's testimony regarding his desire to plead guilty was not credible. The district court's credibility determination is normally entitled to deference because as a fact finder, it is in a better position than a reviewing court to assess the credibility of witnesses. *United States v. Ramirez-Chilel*, 289F.3d 744, 749 (11th Cir. 2002). Goudie has advanced no basis for us to reject the district court's credibility determination, and none could be discerned. Nor has Goudie presented any evidence showing his desire to plead guilty prior to conviction. Thus, notwithstanding the great disparity in the sentence exposure between the plea offer and going to trial, Goudie has failed to establish that he would have pleaded guilty but for counsel's errors. Because Goudie has failed to prove that his counsel was ineffective, we affirm the district court's denial of Goudie's § 2255 motion.

AFFIRMED.

APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 04-13328

**FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
May 27 2005
THOMAS K. KAHN
CLERK**

JOHN GOUDIE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

**On Appeal from the United States District Court for the
Southern District of Florida**

**ON PETITION(S) FOR REHEARING AND PETITION(S) FOR
REHEARING EN BANC**

Before: DUBINA, HULL and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

**ORD-42
(2/05)**

APPENDIX C

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 03-21071-CIV-LENARD/BANDSTRA

JOHN GOUDIE,
Movant

vs.

UNITED STATES OF AMERICA,
Respondent.

**FILED by ___ D.C.
JUL 21 2004
CLARENCE MADDOX
CLERK, U.S. DIST. CT.
S.D. OF FLA.-MIAMI**

**ORDER GRANTING MOTION FOR CERTIFICATE OF
APPEALABILITY**

THIS CAUSE is before the Court on a Notice of Appeal (D.E.26), filed July 1, 2004, by Movant John Goudie, and construed as a Motion for Certificate of Appealability ("COA"). Having reviewed the Motion and the record, the Court finds as follows:

On June 21, 2004, the Court denied Movant's Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255. (D.E. 25). The Court must now determine whether a Certificate of Appealability ("COA") shall issue in this case based on the Notice of Appeal, which it now construes as a Motion for Certificate of Appealability. See Edwards v. United States, 114 F.3d 1083, 1084-85 (11th Cir.1997) (citing 28 U.S.C. § 2253 ©)). Generally, a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 ©)(2). Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253 ©)) is straightforward: "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Where a district court has denied a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

In the instant case, the Court dismissed Petitioner's habeas petition on substantive grounds. In doing so, the Court declined to adopt the Magistrate Judge's recommendation that Petitioner's Motion to Vacate be granted. In light of the difficulty of the issues raised by Petitioner in his Motion to Vacate, the Court finds that Petitioner has met the standard for COA on the sole issue arising from his Motion:

(1) whether trial counsel was ineffective for inadequately advising Petitioner regarding the terms of plea agreement offered by the government prior to trial and the consequences of refusing the plea offer.

Accordingly, it is

ORDERED AND ADJUDGED that:

1. The Notice of Appeal (D.E.26), filed July 1, 2004, by Movant John Goudie, and construed as a Motion for Certificate of Appealability, is **GRANTED**, consistent with this Order.

2. A Certificate of Appealability **SHALL ISSUE** in accordance with the above analysis and pursuant to 28 U.S.C. § 2253(c).

DONE AND ORDERED in Chambers at Miami, Florida this 21st day of July, 2004.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

cc U.S. Magistrate Judge Bandstra
All counsel of record
CASE NO.3-21071-CIV-LENARD/BANDSTRA